

**ISSUES RELATING TO THE DEFINITION OF "SEPARATED FOR REUSE" AND
RELATED REGULATIONS**

I. BACKGROUND

The Permitting and Enforcement Committee approved the initiation of a formal 45-day comment for the Transfer/Processing regulations at its November 1997 meeting. Based upon testimony heard that day, though, it directed staff to discuss the issue of the definition of "separated for reuse" with interested parties and bring back recommendations regarding potential modifications to the definition. A meeting was held of interested parties on February 11, 1998. At that meeting, a number of issues relating to recycling and the two-part test were discussed. Some participants indicated that they would be supplying additional information subsequent to the meeting.

II. ISSUES RAISED AT THE FEBRUARY 11, 1998 MEETING

At the "separated for reuse" meeting held on February 11th, a number of issues related to the definition of "separated for reuse" were discussed. The focus of that meeting was to explore the areas of concern which prompted a request to revise this definition and the problems that a revision to this definition should be designed to address. CIWMB legal staff has placed those concerns into five general categories discussed below. For each of these areas, the concerns are briefly noted and proposed revisions to address these concerns are set forth.

1. DEFINITION OF SEPARATED FOR REUSE

A. Current Proposed Regulation

The following definition appears in the 1/13/98 version of the proposed regulations that were formally noticed:

"Separated for Reuse" means materials, including commingled recyclables, that have been separated or kept separate from the solid waste stream for the purpose of recycling or reuse, and includes materials that have been "source separated".
Section 17402(a)(34)

Several concerns have been raised regarding this definition. In particular, some individuals felt that this definition needed to be more specific; and, that it should more closely match the statutory language relating to recycling (PRC 40180).

Other individuals felt that the existing proposal was adequate because the significant portion of the definition is definite enough ("...separated or kept separate...") matched the statutory language in PRC 40200(b)(2); and, that additional changes should not be made because it risked undoing 1-2 years of effort that went into developing the definition in the first place.

B. Proposed Revised Regulation

The following definition was proposed subsequent to the "separated for reuse" meeting mentioned above:

"Separated for Reuse" means materials, including commingled recyclables, that have been separated or kept separate from the solid waste stream for the purpose of additional sorting or processing those materials for recycling or reuse in order to return them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace.

This proposal does more closely match the definition of "recycling" in the Public Resources Code and it is more specific, which may be helpful to LEAs who may have to make determinations on whether or not a particular activity meets this definition.

In addition, this definition contains language that should prevent it from being used to overextend the Board's jurisdiction. The phrase "...for the purpose of additional sorting or processing..." will allow recycling businesses to engage in their normal activities of sorting and processing of recyclables without being characterized as solid waste processors. The phrase "...in order to return them to the economic mainstream ..." will allow recycling businesses to store recyclables once they have been processed without being characterized as storing solid waste.

C. Staff Recommendation

In general, CIWMB staff has not identified any regulatory reason why the bulk of the proposed definition should not be substituted. However, the proposal also eliminated the last clause of the current version of the definition "...and includes materials that have been "source separated." Given that the Committee previously decided that it wanted to maintain the use of both terms "separated for reuse" and "source separated," CIWMB staff would recommend that this clause be added to the proposed substituted definition.

2. DEFINITION OF REUSE

A. Current Regulations

Concerns were raised that the definition of "separated for reuse" uses the term "reuse," but the regulations do not define this term. For the purposes of clarity, it would seem appropriate to add a definition. No proposed definitions were provided at the February 11, 1998 meeting or subsequent to it.

B. Staff Proposed Regulation

The Board has an existing regulatory definition of "reuse" in its planning regulations where its primary purpose is for characterizing the solid waste stream, including diversion. That definition appears in Title 14 CCR 18720(a)(62) and could be added to the definitions in section 17402:

"Reuse" means the use, in the same form as it was produced, of a material which might otherwise be discarded.

3. DEFINITION OF RESIDUAL

A. Current Proposed Regulation

This definition is relevant for the two-part test and appears in the current proposed regulations as follows:

"Residual" means the solid waste destined for disposal, further transfer/processing as defined in section 17402(a)(39) of this Article, or transformation which remains after processing has taken place and is calculated in percent as the weight of residual divided by the total incoming weight of materials.

A concern has been raised that this definition needs to be further refined to ensure that businesses do not engage in "serial processing" whereby the percentage of residual from each of a series of processors can be kept below the 10% threshold by continuing to send material leaving each business to further processing rather than to disposal.

This concern was raised prior to the formal noticing of the regulations and the language "... further transfer/processing as defined in section 17402(a)(39) of this Article..." was added in an attempt to address this concern. Individual commentators have questioned whether or not, as a practical matter, "serial processing" would occur because it does not appear to be economically advantageous.

B. Staff Recommendation

Board staff has not received any proposal for revising this definition, but some of the suggested revisions discussed below may address the concerns noted. Staff is not currently recommending any additional revisions to this definition.

4. DEFINITION OF RECYCLING CENTER AND THE TWO-PART TEST

A. Current Proposed Regulation

The current proposed regulations contain the following definition and related provisions:

"Recycling Center" means:

(A) an activity that meets the following requirements:

(i) it only receives material that has been separated for reuse prior to receipt; and

(ii) the residual amount of this material that is sent to a solid waste operation or facility after it has been handled by the center is less than 10% of the amount of material received by weight, as calculated on a monthly basis based on the number of operating days; and the calculation shall not include tonnage numbers or residue from materials received in accordance with Public Resources Code Sections 14511.7, 14518, or 14520; and

(iii) the only separation occurring at the center is the sorting of materials that have been separated for reuse prior to receipt; and

(iv) the operator may include an adjustment in the calculation to include the weight of water in the residual, provided that such an adjustment is also made, if necessary, in the weight of materials received for processing only when the use of water is essential to the sorting or processing of the material.

(B) a "recycling center" is not a transfer/processing operation or facility;

(C) if the EA has information that solid waste is being received or that the residual is more than 10% total per month, the burden of proof shall be on the owner or operator to demonstrate that solid waste is not being received or that the residual is less than 10%;

(D) the following waste material types may be subject to regulation by the CIWMB according to section 17402(a)(39) of this Article or other provisions of this Division and shall not be considered "separated for reuse" or "source separated" materials as described in this Article:

(i) cannery waste,

(ii) construction and demolition materials,

(iii) contaminated soil,

(iv) grease-trap pumpings,

(v) nonhazardous asbestos,

(vi) nonhazardous ash,

(vii) organic materials,

(viii) sewage sludge,

(ix) tires;

(E) operations that have indicated that they are recycling centers which do not meet the 10% residual percentage in subdivision (A)(ii) of this definition within one year of the effective date of these regulations, shall be deemed to be transfer/processing operations or facilities, as defined in either subsection (a)(10), (a) (11), or (a)(12) of this section;

- (F) recycling center operators may voluntarily report their residual percentage to EAs and the CIWMB using form CIWMB 607.

Concerns have been raised that these provisions need to be tightened up and made more enforceable.

B. Proposed Revisions

The following proposed revisions were received subsequent to the February 11, 1998 meeting (noted in ~~strikeout~~/underline):

"Recycling Center" means:

(A) an activity that meets the following requirements:

(i) it only receives material that has been separated for reuse prior to receipt; and

(ii) In determining the tonnage of residual solid waste received by the facility:

(*) the residual amount of this material contained within each load of incoming materials ~~that is sent to a solid waste operation or facility after it has been~~ handled by the center is less than 10% of the amount of material received by weight;

(*) the residual amount is calculated by measuring the outgoing tonnage after separated for reuse materials have been removed. This does not prevent the EA from requiring verification by measurement of suspect incoming loads.;

(*) the residual amount is as calculated on a monthly basis based on the number of operating days; ~~and the calculation shall not include tonnage numbers or residue from materials received in accordance with Public Resources Code Sections 14511.7, 14518, or 14520;~~

(*) In determining the tonnage of residual solid waste received by the facility, the following materials shall not be included: materials received by a recycling center located within the facility, and by beverage container recycling programs in accordance with Public Resources Code sections 14511.7, 14518, or 14520, if the recycling activities are separated from the solid waste handling activities by a defined physical barrier or where the activities are otherwise separated in a manner approved by the EA.

(iii) the only separation occurring at the center is the sorting of materials that have been separated for reuse prior to receipt; and

(iv) the operator may include an adjustment in the calculation to include the weight of water in the residual, provided that such an adjustment is also made, if necessary, in the weight of materials received for processing only when the use of water is essential to the sorting or processing of the material.

(B) a "recycling center" is not a transfer/processing operation or facility;

(C) if the EA has information that solid waste is being received or that the total residual is ~~more than~~ 10% or greater total per month, the burden of proof shall be on the owner or operator to demonstrate that solid waste is not being received or that the residual is less than 10%;

(D) the following waste material types may be subject to regulation by the CIWMB according to section 17402(a)(39) of this Article or other provisions of this Division and shall not be considered "separated for reuse" or "source separated" materials as described in this Article:

- (i) cannery waste,
- (ii) construction and demolition materials,
- (iii) contaminated soil,
- (iv) grease-trap pumpings,
- (v) nonhazardous asbestos,
- (vi) nonhazardous ash,
- (vii) organic materials,
- (viii) sewage sludge,
- (ix) tires;

(E) operations that have indicated that they are recycling centers which do not meet the 10% residual percentage in subdivision (A)(ii) of this definition within one year month of the effective date of these regulations, shall be deemed to be transfer/processing operations or facilities, as defined in either subsection (a)(10), (a) (11), or (a)(12) of this section;

(F) recycling center operators may voluntarily report their residual percentage to EAs and the CIWMB using form CIWMB 607.

The main thrust of this proposal seems to be to address issues of enforceability by adding language to reinforce the importance of meeting both parts of the two-part test. Over the last two years, many individuals have come to overemphasize the importance of measuring the residual percentage as compared to the first part of the test - that the material be separated for reuse. This proposal includes some language that emphasizes that intent. It also adds language that would allow for verification of the characterization of incoming material. (Note: Separate from the topics discussed here - this proposal also would reduce the grace period for coming into compliance with these regulations from 1 year to 1 month).

C. Staff Recommendation

Staff would like an opportunity to review these suggestions and seek input from affected parties prior to recommending specific revisions in a formal comment period. These proposed revisions have not been circulated long enough to ensure that all parties have had a chance to fully consider them.

5. ENFORCEABILITY BY LEASs

A. Current Proposed Regulations and Recommended Revisions

Concerns have been raised about providing specific language to assist in the enforcement of the two-part test and to spell out the known parameters of interpretation. No proposed language has been received, but the following is being preliminarily brought forward by Board legal staff as potential additions to the definition of recycling center (at present they have not been numbered):

- To clarify that the material received must be separated for reuse in addition to meeting the 10% residual threshold:

*A business that accepts loads of mixed solid waste does not qualify as a recycling center.

- To deal with the possibility of a business that repeatedly fails to comply with the two part test:

*If the EA determines that a business has exhibited a pattern and practice of failing to comply with the provisions of this subsection, the EA may issue a Notice and Order requiring the business to obtain a Registration or Full Permit or comply with the Enforcement Agency Notification requirements as made applicable in sections 17403 through 17403.7 of this Article.

- To deal with the potential problem of "dilution:"

*If the EA has reason to believe that a business is concealing the acceptance of mixed solid waste by averaging or combining those loads with other loads of separated for reuse material, the burden of proof will be on the business to demonstrate that it is not accepting loads of mixed solid waste.

- To provide more specific language for LEA inspection and enforcement activities:

*Nothing in this section precludes the enforcement agency or the board from the following: inspecting a business to verify that it is conducted in a manner that meets the provisions of this subsection; or, from taking any appropriate enforcement action, including the use of a Notice and Order as provided in Section 18304.

**6. MOVING DEFINITIONS AND RELATED PROVISIONS TO A NEW SECTION
17402.5**

This issue is not one that was discussed at the February 11, 1998 meeting. However, the Board's legal staff has noted that the definition of recycling center as proposed, as well as proposed revisions to it, is becoming increasingly detailed and appears to look less and less like a definition. For purposes of clarity and ease of use, the regulations include a Table, on page 15,

which indicates where various operations and facilities are placed within the regulatory tiers. That table also includes a column indicating those activities that are "not subject to Articles 6.0, 6.1, 6.2, 6.3, and 6.35."

For similar reasons, Board legal staff would like to bring forward a proposal to add a new section (probably 17402.5) entitled "Definitions and other provisions regarding activities that are not subject to the Transfer/Processing Requirements." This section would include all of the definitions relating to the first column of Table 1 in one location. This would provide additional ease of use for these regulations in the same manner as Table 1. This proposal was only recently circulated to the affected parties and staff is seeking input prior to specifically recommending that this revision be made.